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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

Nos. 1031 and 1081

MARVIN J. MORSE,
Petitioner,

vs.

D. A. HINDMAN, et al.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONER'S PETITIONS FOR A WRIT OF CERTIORARI

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I.

STATEMENT

Petitioner, Marvin J. Morse, has filed two petitions for writ of certiorari which are numbered 1031 and 1081. The first petition seeks review of judgments in cases from the following courts: United States District Court for the District of Kansas, *Mary Catherine Shepard, et al.* v. *Charley A. Lynd, et al.*, Case No. T-3987; Supreme Court of the State of Kansas, *D. A. Hindman* v. *Mary Catherine*

Shepard, et al., Case No. 45622; The United States Court of Appeals for the Tenth Circuit, *Marvin J. Morse* v. *District Court of Rooks County*, Case No. 20-69. The second petition appears to seek review of the same case in the Supreme Court of the State of Kansas, *Hindman* v. *Shepard, et al.* This brief in opposition to certiorari will be directed to both petitions.

II.

ARGUMENT

A chronology of the cases sought to be reviewed begins March 4, 1966, when a class action was commenced in the United States District Court for the District of Kansas styled *Mary Catherine Shepard, et al.* v. *Charley Lynd, et al.*, Case No. T-3987, seeking a determination that conveyances and a quiet title action involving a tract of property located in Rooks County were void. The class consisted of eight sisters, three of whom were residents of Kansas and five nonresidents. Answers were filed by the respondents herein challenging the class action, and on October 21, 1966, an order was entered dismissing the class action as being improper with leave granted in the order that the plaintiffs could file an amended complaint as individuals.

On October 28, 1966, before any amended complaints were filed in the Federal District Court case, these respondents commenced an action in the District Court of Rooks County, Kansas to quiet their title to the same Rooks County property. All the members of the class that had brought the action in the United States District Court were joined as defendants. Answers and counterclaims were filed by the defendants seeking to establish an adverse title to the property.[1]

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1. Mary Catherine Shepard, one of the eight sisters, died while a party in both the U. S. District Court case and the Rooks County case. Petitioner, Marvin J. Morse, who is one of her children has become a party in both cases by orders of substitution.

On November 1, 1966, an amended complaint was filed in the U. S. District Court case by two members of the class. Subsequently, other members of the class joined as plaintiffs in the U. S. District Court case. After the actions were on file in both Courts, motions were filed by the plaintiffs in the United States District Court case to enjoin the State Court action on the ground that the Federal Court had acquired exclusive jurisdiction and a stay order was necessary to aid and protect that jurisdiction. The U. S. District Court overruled all these motions.

In September, 1968, a trial was held in the Rooks County District Court case on all the issues raised by the claims and counterclaims. Petitioner, Morse, was present at the trial and represented himself. Other defendants, some of which were witnesses at the trial, were represented by attorneys. The trial resulted in a judgment being entered in favor of these respondents. The memorandum opinion of the District Court of Rooks County is included in the appendix as Exhibit "A".

After the Rooks County judgment had been filed, these respondents filed a motion to stay the proceedings in the U. S. District Court pending a final determination of the Rooks County case. In the meantime notices of appeal to the Supreme Court of the State of Kansas from the Rooks County judgment were filed by all the defendants in that action including petitioner, Marvin J. Morse. The U. S. District Court sustained the motion to stay its proceedings on the grounds that the Rooks County judgment would be conclusive on the issues raised in the case before it. A notice of appeal to the United States Court of Appeals for the Tenth Circuit has been filed by petitioner from the U. S. District Court orders denying an injunction against the Rooks County action, overruling petitioner's motion for summary judgment and the order staying proceedings.

This appeal has just recently been docketed with the Clerk of the Court of Appeals for the Tenth Circuit.

Soon after the filing of the notice of appeal, petitioner commenced an action in the United States Court of Appeals for the Tenth Circuit for a writ of prohibition on injunction to restrain the Rooks County District Court from exercising any jurisdiction over the Rooks County property. In denying the writ the United States Court of Appeals noted that the U. S. District Court had previously refused to stay the Rooks County action. After the writ was denied, petitioner then filed a motion in the Supreme Court of the State of Kansas to dismiss the State Court action on the grounds of failure of jurisdiction. The Kansas Supreme Court denied the motion.

In summary, the status of all the litigation at the time the petitions for certiorari were filed was as follows:

(a) The U. S. District Court case had been stayed by order of that Court.

(b) An appeal had been docketed with the U. S. Court of Appeals for the Tenth Circuit from the orders of the U. S. District Court staying its own proceedings, overruling a motion for summary judgment and overruling motions to enjoin the Rooks County action.

(c) The District Court of Rooks County case had been tried and a judgment entered in favor of these respondents. The judgment is in the process of appeal to the Supreme Court of the State of Kansas.

Rules 19 and 20 of the Rules of the Supreme Court of the United States set forth considerations governing review on certiorari. Rule 20 states:

> "A writ of certiorari to review a case pending in a court of appeals, before judgment is given in such

> court, will be granted only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in this court."

The judgments of the U. S. District Court for the District of Kansas sought to be reviewed by certiorari prior to any judgment by the U. S. Court of Appeals for the Tenth Circuit are orders granting a stay of proceedings and denying an injunction against the Rooks County Court. It is obvious the judgments are not of imperative public importance to justify circumventing the normal appellate process.

The writ of prohibition denied by the U. S. Court of Appeals for the Tenth Circuit involved the same as the order by the U. S. District Court denying an injunction against the Rooks County Court. Neither Court found it necessary to protect the jurisdiction of the Federal Courts by enjoining the State Court action. The decision by the Court of Appeals for the Tenth Circuit is not within the consideration mentioned in Rule 19 1.(b) for governing review on certiorari.

The decision of the Supreme Court of Kansas sought to be reviewed is an order denying the petitioner's Motion to Dismiss for Lack of Jurisdiction. Prior to this motion, the petitioner had filed a notice of appeal to the Supreme Court of Kansas from the judgment of the District Court of Rooks County, Kansas. By the filing of the motion the petitioner obviously was attempting to place the issue of jurisdiction of Rooks County Court before the Supreme Court of Kansas without adhering to the State's appellate process. The Supreme Court of Kansas by dismissing the motion has not made a final adjudication of the case or for that matter the issue of jurisdiction. The decision is clearly not of the character as set forth in Rule 19 1.(a) of the Rules of the Supreme Court of the United States.

III.

CONCLUSION

The decisions sought to be reviewed by the petitions for writ of certiorari do not meet the requirements or considerations as provided in Rules 19 and 20 of the Rules of the Supreme Court of the United States and the petitions for writ of certiorari should be denied.

Respectfully submitted,

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IN THE DISTRICT COURT OF ROOKS COUNTY, KANSAS

D. A. HINDMAN and CHARLEY A. LYND,
Plaintiffs,
vs.
MARY CATHERINE SHEPARD, ET AL.,
Defendants.

No. 9873

MEMORANDUM OPINION

This is a quiet title suit. To the petition certain of the defendants filed answers and cross petitions. The cross petitions primarily allege ownership in the property and fraud on the part of the plaintiffs.

A pretrial was held in which all of the questions of fact and of law were fully and ably presented to the Court. A question of the right to a trial by jury was raised by some defendants. The Court held that a jury would not be called except on the question of the amount of damages to which cross-petitioners would be entitled if the ownership was found to be in defendants.

The case was fully tried thereafter to the Court. The Court requested briefs to be accompanied by requested Findings of Fact and Conclusions of Law. Since the trial the Court has been furnished excellent briefs and requests. The first briefs were received in late May, and the last was received from defendant Marvin J. Morse during the week of July 22d. To this brief under the Court's order plaintiffs have a right yet to reply. However, under date of June 26, 1968, plaintiffs advised the Court that plaintiffs would make no further reply, so it is assumed this last brief of Marvin J. Morse will not be answered.

The Court having found for the plaintiffs is largely adopting the requested Findings of Fact and Conclusions of Law as submitted by plaintiffs with certain amendments and deletions thought either improper or irrelevant.

Findings of Fact

1. This is an action brought to quiet the title to certain real estate situated in Rooks County, Kansas. Plaintiff, Charley A. Lynd, is the owner, in possession, of the entire surface estate and an undivided 3/8ths interest in the minerals and mineral estate in the following described land?

> All that portion of Section Thirty-two (32), Township Nine (9), Range Nineteen (19), Rooks County, Kansas, lying south of the Union Pacific Railroad right-of-way.

Plaintiff, D. A. Hindman, is the owner, in possession, of an undivided 1/4th interest in the minerals and mineral estate in and under the above described land. The defendants are collectively the owners of an undivided 3/8ths interest in the minerals and mineral estate in and under the above described land, but claim to be the owners of the entire fee simple interest in said land, which claim is asserted in answers and cross-petitions filed in this action. The original defendants in this action are the eight daughters of George W. Atherton and Hattie Atherton, deceased. During the pendency of this action, one of the daughters, Mary Catherine Shepard, died. By proper proceedings and order of the Court, her surviving children and heirs were substituted and served as parties defendant. This is an action brought to quiet or determine title under the provisions of K.S.A. 60-1002. Proper service has been made on each of the defendants and substituted defendants.

2. At one time, the real estate in question was owned by James E. Atherton, who died testate on July 21, 1925.

The will of James E. Atherton was admitted to probate in Rooks County, Kansas. The property in question was devised by paragraph Sixth of the will, which reads:

> "Sixth: I give, devise and bequeath to my son, George W. Atherton, of Sharon Springs, Kansas, to be held by him and for his use during his natural life time, provided he pays the taxes as they become due and payable on the following described land: All that portion of Section Thirty-two (32), Township Nine (9), Range Nineteen (19), Rooks County, Kansas, lying south of the Union Pacific Railroad right-of-way. After the death of my son, the said George W. Atherton, it is my will and I hereby direct that the last above described real estate shall descend to the children of his body and that the same be held by them and for their use for a period of twenty (20) years from the time of the death of the said George W. Atherton, after which time the same children of my son, George W. Atherton, shall come into full possession of the said described real estate and may hold the same or dispose thereof in any manner they wish."

The present defendants are the children and grandchildren of George W. Atherton.

3. George Atherton took possession of the real estate following the death of his father James E. Atherton, and continued in possession of the property until the occurrence of certain events in 1944. For at least 12 years prior to 1944, George Atherton failed to pay the taxes on the property. The George Atherton family was in difficult financial straits in 1944, and for several years before, and the taxes were unpaid because of this condition.

4. In the fall of 1943, the Board of County Commissioners of Rooks County, Kansas, brought an action (Case No. 7783, styled *Board of County Comm.* v. *Silvers*) to foreclose its lien for delinquent taxes on this and other tracts of real estate in Rooks County. At that time the

delinquent taxes on this property totaled $3,045.59. Proper service was made on George Atherton and his wife Hattie Atherton, and on each of their eight children.

5. Shortly after the commencement of the tax foreclosure action, George Atherton and his wife employed D. A. Hindman, an attorney in Stockton, Kansas, and one of the plaintiffs in this action, to represent them as counsel in the tax foreclosure case. Hindman, with the knowledge and consent of his clients, prepared and filed an answer in the tax foreclosure action admitting that George Atherton was the owner of the property and requesting that if the property be sold at tax foreclosure, any surplus in sale proceeds above the amount of delinquent taxes and costs of the proceeding be paid to George Atherton. In due course, an order was entered in the tax foreclosure proceeding directing that any surplus sale proceeds be paid to George W. Atherton.

6. George Atherton did not have the money to pay the delinquent taxes on the real estate; prior to the foreclosure sale he and his wife undertook to arrange a private sale of the property under circumstances which would preserve some interest in the mineral estate for themselves and their children. The tax foreclosure sale was to be held February 11, 1944. George W. Atherton and his wife Hattie Atherton traveled to Wakeeney to meet with the plaintiff Lynd. The plaintiff Hindman was not present at the meeting. On February 10, the day before the sale, Hattie Atherton called Hindman long distance, and informed him that the Athertons and the Lynds had arrived at an agreement by which Lynd would purchase the property and, as consideration for the purchase, would pay the delinquent taxes and an additional amount of $3,000 to George and Hattie Atherton. It was also agreed that George and Hattie Atherton would retain or receive by

conveyance from Lynd, an undivided 3/8ths interest in the oil, gas and other minerals under the property for a period of twenty (20) years from the date of the transaction and as long as there was production on the property. Hattie Atherton requested Hindman to advance the funds necessary to pay the taxes and redeem the property before sale because it appeared likely that weather conditions would prevent the Lynds and Athertons from making the trip from Wakeeney to Stockton by the time of the sale. Hindman followed the instructions of his clients and on the following day, February 10, 1944, advanced the funds necessary to pay the delinquent taxes and caused the redemption of the property to be entered in the name of George W. Atherton.

7. The Lynds and the Athertons went to Stockton and met with the plaintiff Hindman to arrange for closing of the sale transaction. Lynd reimbursed Hindman for the funds advanced in payment of the delinquent taxes. A special warranty deed was prepared, executed and delivered by George W. Atherton and Hattie Atherton, transferring title to the real estate in question to the plaintiff Lynd. Hindman advised the parties that because of the terms of the will of James E. Atherton and doubts or legal questions as to the character of the estate created by the Sixth paragraph of the will which passed title to this property, it would be necessary to commence and successfully conclude a quiet title action in order to vest in the purchasers a merchantable title. During this meeting, a contract of employment between Lynd and his wife and Hindman was prepared and executed, providing, in substance, that Hindman would be entitled to receive for his services in connection with the title action an undivided 1/4th interest in the oil, gas and mineral rights in the land for a period of twenty (20) years and as long

as oil or gas is produced from the property if he were successful in clearing the title to the property. During the meeting the plaintiff Lynd requested George and Hattie Atherton to contact their eight daughters and explain the transaction to them in order to be certain that there would be no misunderstandings or hard feelings in the family.

8. The plaintiff Hindman prepared and filed the papers necessary to commence an action to quiet the title. (Case No. 7807, styled *Lynd* v. *Hillman,* in the District Court of Rooks County, Kansas) The eight daughters of George and Hattie Atherton, along with other parties, were named and joined as defendants. The records on file with the Clerk of this Court in Case No. 7807 (of which the Court takes judicial notice with the consent and stipulation of the parties) reflect that each of the eight children of George W. Atherton and Hattie Atherton were duly and properly served or summoned in the quiet title suit in the manner provided by law. In addition to service by publication on the defendants residing outside the state of Kansas, plaintiff Hindman mailed by registered mail copies of the publication notice to all such defendants, and receipts with signatures of these defendants appearing thereon were returned and filed in Case No. 7807. During the pendency of the quiet suit, George and Hattie Atherton contacted each of their daughters to inform them of the transaction with Lynd and the pending quiet title suit. On February 16, 1964, Hattie Atherton wrote plaintiff Lynd, as follows:

> "We have seen and heard from five of the children and I have written the other three everything is perfectly satisfactory with them and they will do all they can to help clear the title for you either by ignoring the notice the sheriff serves on them and if it is necessary later for them to sign the deed, they will do that.

> All they want is for the agreement between you, Elida (Lynd), George and I put into writing giving George and I and our heirs 3/8th of the oil and gas rights or mineral rights for twenty years or as long after as the land produces." (Plaintiffs' Exh. 5)

On April 7, 1944, Hindman, acting on the instruction of his clients, prepared the agreement requested in Hattie Atherton's letter to Lynd. This contract was signed by George Atherton and his wife, and Lynd and his wife. It provided, in substance, that the Lynds would convey to the Athertons 3/8ths interest in the oil, gas and mineral rights for a period of twenty (20) years and as long as oil or gas is produced from the premises, immediately after completion of the quiet title proceeding.

9. The Court finds that each of the eight daughters of George and Hattie Atherton (including Mary Catherine Shepard, deceased) had actual knowledge of the transaction entered into by their parents with the plaintiff Lynd. They also knew that as a part of that transaction a quiet title suit was commenced and prosecuted in which they were joined and summoned as defendants. The Court also finds that the eight daughters failed to appear and plead or assert any title to the property in the quiet title action and that they did so knowingly and intentionally. None of the defendants acted upon any advice or statement of the plaintiffs. None of the eight children were under any disability which would have prevented them from asserting any claims or rights which they might have had or believed they had at the time of the quiet title suit. The defendants and cross-petitioners in this action have failed to sustain the burden of showing that they were misled, defrauded or overreached by anyone in connection with their failure to appear and litigate the 1944 quiet title action.

10. The evidence is clear and uncontroverted, and the Court finds, that all communications with the eight daughters of George and Hattie Atherton which took place during the transaction with Lynd and the commencement and prosecution of the quiet title action, were communications between the children and their parents. Neither Hindman nor Lynd had any communications or made any representations to the children of George and Hattie Atherton concerning the Lynd transaction or the quiet title suit. There is no creditable evidence adduced by the defendants and cross-petitioners in this action tending to establish that George Atherton or Hattie Atherton were acting as the agents or as conspirators with either of the plaintiffs in connection with any statements made by the parents to their children concerning the Lynd transaction or the quiet title suit. The evidence adduced by all of the parties convinces the Court that Lynd and Hindman were at all times acting in good faith. The Court also believes that at the time of the tax foreclosure, the transaction with Lynd and the quiet title action, George Atherton and his wife were acting in good faith and pursued the course which they believed to be the most reasonable and best one available to them to salvage some interest in the land for themselves and for their children.

11. On April 12, 1944, judgment was entered in the quiet title action (Case No. 7807) quieting title to the fee simple interest in the real estate in the plaintiff Lynd, and declaring the defendants in that action to have no right, title or interest in the property. No appeal was taken from that judgment. At the time of the trial and final hearing in that action, the Lynds and Athertons were present in the courtroom. There was no misstatement or misrepresentation by anyone present concerning the interest, position or failure to appear and plead, of the children of George and Hattie Atherton. The plaintiff Lynd entered

into possession of the property and has remained in possession and has paid taxes on the surface and 3/3ths of the mineral estate since that date. The plaintiff Hindman entered into possession of an undivided 1/4th interest in the mineral estate.

12. On or about June 15, 1944, the Lynds and the Athertons concluded the transaction between them. Lynd paid George Atherton the sum of $3,000, the balance of the purchase price of the property. Lynd and his wife executed royalty or mineral deeds to George W. Atherton and his wife, and to plaintiff Hindman, which conformed to and carried out the terms of the written agreements between them.

13. At various times since 1944, the plaintiffs and their wives and George and Hattie Atherton joined in the execution of oil and gas leases covering all or parts of the property in question. Oil production was first discovered on the property in 1951, but these wells were subsequently plugged and abandoned. In 1960 production was again discovered, and there are several producing wells on the property at the present time.

14. When George and Hattie Atherton received the payment of $3,000 from the plaintiff Lynd, in the summer of 1944, they paid to each of their daughters the sum of $100. The children knew and understood that this money was a part of the consideration received by their parents in the Lynd transaction. When oil was discovered and first produced from the property in 1951, George and Hattie Atherton distributed portions of the royalties received by them to their eight daughters, who accepted and retained these payments with knowledge of the source from which they came. George Atherton died in 1961, and Hattie Atherton died in 1963. Following the death of their parents, the eight daughters of George and Hattie Atherton

succeeded to the 3/8ths mineral and royalty interest acquired by their parents in the Lynd transaction. Since the probate of their parents' estates, they have been paid, and have accepted and retained, their proportionate share of the oil and gas royalties accruing to the 3/8ths royalty interest owned by their parents. The defendants executed division orders with the purchasers of crude oil from the premises under which they were paid their respective shares of the 3/8ths royalty interest owned by their parents.

15. The defendants failed to take any action or commence any legal proceedings to assert any right, title or interest in the property or set aside the judgment in Case No. 7807 for more than twenty (20) years after the Lynd transaction and the entry of judgment in Case No. 7807. On March 25, 1960, the defendant Margaret Christensen (then Margaret Jewkes executed and delivered a Quit Claim Deed to the property in question in which her father George W. Atherton was named as the grantee.

Conclusions of Law

1. The Court has jurisdiction of the parties and this action.

2. The defendants and cross-petitioners have failed to sustain the burden of proof to show that they were defrauded or in any way unlawfully deprived of an interest or expected interest in the real estate involved in this action.

3. The claims of the defendants and cross-petitioners, insofar as they seek to recover any title or estate in the property greater than the 3/8ths mineral and royalty estate presently vested in them by inheritance from their parents, or insofar as they seek to claim any title adverse to

the present title and estate of the plaintiffs, have been barred by laches, adverse possession and the statutes of limitation, and specifically, by the provisions of K.S.A. 60-260, 60-507 and 60-513.

4. The defendants' claims in this action, and their cross-petitions, amount to an improper collateral attack upon the judgment of this Court in Case No. 7807, *Lynd* v. *Hillman*, et al.

5. The judgment in Case No. 7807 is res judicata and conclusive of the defendants' claims asserted and litigated in this action.

6. The defendants' cross-petitions are denied and plaintiffs are entitled to judgment against the defendants and each of them for the relief sought in their petition. Counsel for plaintiffs will prepare and submit an appropriate Journal Entry of Judgment.

Dated this ..... day of August, 1968.

/s/ C. E. Birney
District Judge